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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 JAMES CONTANT, et al.,

5 Plaintiffs,

6 v.

17-CV-3139 (LGS)

7 BANK OF AMERICA CORPORATION, et al.,

8 Defendants.

Fairness Hearing  
(Via Teleconference)

9 -----x

November 19, 2020  
11:30 a.m.

10 Before:

HON. LORNA G. SCHOFIELD,  
District Judge

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1 THE DEPUTY CLERK: James Contant, et al. v. Bank of  
2 America Corporation, et al., Docket 17-CV-3139. We are here  
3 before the Honorable Lorna G. Schofield.

4 I want to remind the parties and the press that  
5 recording or rebroadcasting of this proceeding is prohibited.  
6 Violation of this prohibition may result in sanctions. Thank  
7 you.

8 THE COURT: Okay. So we're here for a final fairness  
9 hearing for approval of settlement in one of the so-called  
10 Forex cases, and this one involving plaintiffs who indirectly  
11 purchased foreign exchange instruments from the defendant.

12 I have your papers. I know we're here on a variety of  
13 motions -- the motion for final approval of the settlement and  
14 related approval, as well as the fee application and  
15 application for a service fee for the named plaintiffs.

16 And so as you all know, just from having participated  
17 in the preliminary fairness hearing, that is the time when I  
18 really scrutinized the settlement, because there is no point, I  
19 think, in sending a notice out for settlement that is not going  
20 to be approved. So I have done that, and then that applied for  
21 the most part.

22 If Mr. Dell'Angelo would like to make a brief  
23 statement about the settlement, and particularly about the lack  
24 of opt-out objections and the notice and etc., I'll be happy to  
25 hear that.

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1 MR. DELL'ANGELO: Thank you, your Honor. I appreciate  
2 that. I will say that I am pleased to say I think I what you  
3 are suggesting is exactly what I was going to propose to the  
4 Court as a structure to keep this discussion efficient in light  
5 of what Rule 23 requires for preliminary approval. I will be  
6 brief. And then to the extent you have questions or would like  
7 us to address any part of the motion, of course, we're more  
8 than happy to do so.

9 So, of course, we are again pleased to present for  
10 final approval five settlements, totaling \$23.63 million, that  
11 will fully and finally resolve the litigation.

12 When your Honor examined the settlements at the  
13 preliminary approval stage, we outlined -- and I think there  
14 was some discussion and of course consideration in your Honor's  
15 order of the various Grinnell factors, one of which neither the  
16 parties nor the Court had information about at the time was the  
17 reaction of the classes to the settlement. In order to frame  
18 that, I would like to take a moment to address the notice plan.

19 Pursuant to your Honor's order, we utilized Heffler  
20 Claims Group to disseminate notice. Initially Heffler Claims  
21 Group had projected that the notice program would reach between  
22 80 and 86 percent of the settlement class. We're very pleased  
23 to report that largely, in light of our efforts to gather data,  
24 RFEDs, retail foreign exchange dealers, with whom the absent  
25 class members and class members transacted, we obtained e-mail

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1 addresses and typical mail addresses that enabled the notice  
2 program to, based on the claim administrator's estimates, reach  
3 approximately 95 percent of the settlement class. And what's  
4 more, the structure of the settlement, the notice program  
5 enabled us to reach each class member approximately 3.9 times,  
6 based on the estimates of the claims administrator.

7 We did so by mailing 94,876 postcard notices on  
8 August 12. A percentage of those, about 16,000, came back as  
9 undeliverable. The claims administrator then did considerable  
10 effort in terms of skip tracing and researching at those  
11 addresses, and remailed close to 14,000 of them. And only  
12 about 890 came back as undeliverable.

13 At the same time, the claims administrator on  
14 August 12, 2020, e-mailed 43,309 notices to absent class  
15 members. And a very small fraction of those, 2,450, bounced  
16 back as undeliverable. And just to reaffirm, we engaged the  
17 claims administrator to send a reminder on October 27, which  
18 had no undeliverables as a result of weeding out the first set  
19 of undeliverables.

20 The mail and e-mail notice that we effected with the  
21 addresses that we obtained through the RFEDs was reinforced in  
22 a number of ways, through a publication notice and Internet  
23 advertising notice.

24 On August 10 a press release issued that was targeted  
25 to 1,770 influencers who cover finance. That press release

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1 picked up in the news and received almost 100 mentions.

2 Then separately, all of that work was bolstered with  
3 banner ads, Google search ads, and social media ads on Facebook  
4 and Instagram that were targeted both from the eight states  
5 where the plaintiffs and the absent class members reside, and  
6 which covers scope of the settlement.

7 And then further focused on financial institutions and  
8 other financial advertising and news outlets such as The Wall  
9 Street Journal, Seeking Alpha, Morningstar, etc.

10 And all of that was then backed up with a settlement  
11 website that has been active since August 8, 2020. That alone  
12 has had over 15,000 page views and is backed by a 24-hour  
13 toll-free line and a dedicated post office address.

14 As a result of those efforts, having reached at least  
15 95 percent of the settlement class members directly, and then  
16 through various publication notice, we're extremely pleased to  
17 report not a single class member has objected or opted out of  
18 the settlement. And as Judge Rakoff has recently found in the  
19 GSE Bonds Antitrust Litigation case, a favorable reception from  
20 the class constitutes strong evidence that proposed settlement  
21 is fair.

22 And I'd like to emphasize, because all defendants have  
23 settled, and not a single absent class member has objected or  
24 opted out, this will in fact affirm legal fees for the  
25 defendants and achieve exactly what the parties were trying to



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1 achieve, and is an indication that the class members found the  
2 settlement to be fair, reasonable and adequate. And an  
3 indication as well that none believe that they could do better  
4 than we were able to do for them as part of the settlement.

5 Unless your Honor has specific questions about that  
6 process or anything else in our submission, I would rely on our  
7 filing.

8 I guess just making one additional note to be  
9 abundantly clear for the record, sometimes in these cases class  
10 counsel will receive a comment or a criticism by e-mail or  
11 voicemail from class members, positive or negative. We have  
12 not received -- and those don't constitute a valid  
13 opt-out/objection. Even post the October 15 opt-out/objection  
14 deadline, we haven't even received a single word of criticism  
15 from that.

16 THE COURT: Okay. Great. I'm not sure if I've ever  
17 seen where there is not a single objection or opt-out. So  
18 congratulations on that. I don't have any other questions  
19 about the settlement itself.

20 I have one request, and that is that you e-mail my  
21 chambers the proposed order in Word format.

22 I did want to turn to your other motion, which is  
23 application for fees and expenses as well as service fees. I  
24 would just note -- I will confess, I didn't look at the caption  
25 on the proposed order. I just started reading it. And I was

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1 fairly alarmed. And when I did finally look at the caption,  
2 you had attached the wrong proposed order. So a lot of  
3 questions that I was going to ask, I won't ask.

4 But I will ask for a new proposed order for this case  
5 for the fee application and service fee. I had a few questions  
6 in that regard.

7 For the fee application, how will it be allocated  
8 among the plaintiffs' firms?

9 MR. DELL'ANGELO: First, thank you. Your Honor, let  
10 me apologize for the inadvertent error in the proposed order.  
11 I think as we indicated in your Honor's form pursuant to  
12 Individual Rule III.C.5, the fees will be allocated to class  
13 counsel on a straight lodestar basis. Meaning, there is no  
14 sort of differentiation between what multiple counsel may  
15 receive or the like. The understanding among --

16 THE COURT: Just so I have it, so it's pro rata based  
17 on lodestar; is that right?

18 MR. DELL'ANGELO: That's correct. With the  
19 understanding that the fee award, at least as requested,  
20 represents a negative lodestar of about .94. But, yes, it  
21 would be pro rata.

22 THE COURT: Okay. All right. I presume, but I want  
23 confirmation, that there is no other fee sharing?

24 MR. DELL'ANGELO: Well, there is. As we indicated in  
25 your Honor's form III.C.5, there is one referral agreement. I

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1 think your Honor has a fee sharing disclosure requirement  
2 and --

3 THE COURT: I didn't find that in your papers.

4 MR. DELL'ANGELO: Oh, okay.

5 THE COURT: Do you have a docket number of that  
6 particular piece of paper?

7 MR. DELL'ANGELO: Sure, let me take a look at it. I  
8 have to confess, this version does not have the docket number  
9 on it. While I'm trying to identify the docket number, maybe  
10 Mr. Ripley or Mr. Kane have it handy and they can identify it  
11 for us.

12 What that disclosure provides, your Honor, is that the  
13 Kehoe Law Firm, who represents FXPRIMUS, a Florida-based  
14 plaintiff in the case, that the agreement among counsel is that  
15 the Kehoe firm would receive 10 percent of the attorney's fees  
16 that were attributable to the settlement amounts that went to  
17 Florida plaintiffs.

18 So the idea being, if Florida plaintiffs made claims  
19 in the amount of whatever percentage they would be, if they  
20 have 10 percent of the total, we would take that 10 percent and  
21 say, in effect, 10 percent of the attorney's fees were  
22 attributable to Florida, and the Kehoe firm would receive  
23 10 percent of those fees.

24 The disclosure itself appears at docket 419-1, page  
25 eight of nine. That's the first place that I spotted. I think

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1 we submitted it a few times, your Honor. That was attached to  
2 plaintiff's memorandum in support of plaintiff's motion for  
3 preliminary approval.

4 THE COURT: Okay. What else is there? It sounds like  
5 there are nine pages in this document. What else is disclosed  
6 in the document?

7 MR. DELL'ANGELO: That particular document is the full  
8 submission pursuant to your Honor's individual practice, or  
9 Individual Rule III.C.5. That just provides a brief  
10 introduction of the settlements, a discussion of the total  
11 settlement fund, the claims administration fees, cost and  
12 expenses. Just on the ninth page -- sorry. And the last page,  
13 your Honor, has subpart VIII as what Rule III.C.5 requires, the  
14 summary of information. And the summary of information, your  
15 Honor, has the table that asks for the settlement amount, the  
16 estimated notice of administration costs, expert fees,  
17 anticipated fee, etc.

18 THE COURT: Right.

19 MR. DELL'ANGELO: So the last is that rule,  
20 disclosure, it begins on page seven of nine.

21 THE COURT: So my question is, maybe can I ask my law  
22 clerk, who I know is on the phone, if she can send me that --

23 MR. DELL'ANGELO: I'm sorry to interrupt.

24 THE COURT: That's okay. You found the other one at?

25 MR. DELL'ANGELO: Docket 420, discussed in paragraph

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1 33.

2 THE COURT: So my question is, is there anything else  
3 about fees and where the fees are going? I understand that  
4 there is one referral agreement, as you described it, and I  
5 understand the allocation of plaintiff's firm. Is there any  
6 other arrangement with respect to fee?

7 MR. DELL'ANGELO: None whatsoever, your Honor.

8 THE COURT: Okay. And nothing has been paid to any  
9 putative objectors; is that right?

10 MR. DELL'ANGELO: Nothing. And, again, just to be  
11 clear, we haven't even heard from them. I haven't heard from  
12 an objector. Nothing has been paid to anybody or promised or  
13 even discussed; haven't heard from any.

14 THE COURT: Could you tell me what the settlement  
15 agreement says about the timing of the payment of fees and  
16 expenses, as provided in the settlement agreement. Remind me  
17 what that says.

18 MR. DELL'ANGELO: It becomes effective after the order  
19 on fees becomes final. So we interpret that to be 30-plus-one  
20 days after the order is issued, provided that there is not an  
21 appeal.

22 THE COURT: Okay. What is the timing of the payment  
23 of the claim?

24 MR. DELL'ANGELO: The plan of allocation, the order on  
25 the plan of allocation has a schedule built into it.

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1           THE COURT: The reason I ask, while you're flipping to  
2     it, I know there are good arguments for getting class counsel  
3     paid sooner than later, primarily that you've been litigating  
4     this case since 2017 and you haven't been paid anything, and  
5     that there is considerable risk during that time of what would  
6     be paid; I suppose, theoretically, there still is. It also  
7     seems a bit unseemly to me to write quite a large check to  
8     class counsel, at the same time that the claimants and class  
9     members aren't being paid. And particularly when there is a  
10    long period of time between the final approval of the  
11    settlement and the actual payment of class members.

12           And so that's what I'm trying to get out. I'm trying  
13    to figure out when people will likely get paid. Because it  
14    affects my consideration of when class counsel will be paid.

15           Hello?

16           MR. DELL'ANGELO: Sorry, your Honor.

17           THE COURT: I'm glad I didn't lose you.

18           MR. DELL'ANGELO: I was trying to be sensitive to  
19    background noise, and was muted.

20           The claims deadline is within 120 days after final  
21    approval is granted. So the date to get in those claims will  
22    depend a little bit on when it is your Honor enters final  
23    approval. That's the claim form, just to be clear, to get the  
24    claim form in to the claims administrator.

25           Because we have fairly detailed data from all the

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1 RFEDs as a result of the subpoena that we went through, I  
2 anticipate the claims process can be handled pretty efficiently  
3 because we already have the data to cross-check information  
4 that the plaintiffs submit.

5 But there is not a date certain, as is generally the  
6 case in these settlements, when checks would actually be cut.  
7 We need to get the claims in and process it.

8 THE COURT: Could you check with the claims  
9 administrator and get an estimate of how long it takes to pay  
10 the claims after the claims deadline. And put that in a letter  
11 and file the letter. And the sooner you file the letter, the  
12 sooner I can act on the fee application.

13 I know there are separate orders. I can certainly act  
14 on the final approval of the settlement -- which there is no  
15 mystery, I am approving -- I can act on that quickly. And then  
16 I can act on the fee application once I understand when  
17 plaintiffs will be paid or an estimate of when they will be  
18 paid.

19 MR. DELL'ANGELO: Of course, your Honor, I'll be happy  
20 to do that.

21 THE COURT: Okay. I won't set a deadline. It's in  
22 your interest to get that to me sooner than later. I'll look  
23 it at when I get it.

24 MR. DELL'ANGELO: Understood.

25 THE COURT: With respect to the service fees for the

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1 class representatives, I understand you're seeking \$5,000 for  
2 class representatives, which is reasonable and it's consistent  
3 and in line with what I have ordered in other cases. I won't  
4 be having any trouble with that either. The reason I was a  
5 little bit alarmed, in the proposed order you had given me the  
6 proposed payment to each of the class representatives of  
7 \$40,000. I didn't even know that courts did that, but perhaps  
8 in other kinds of cases they do.

9 So in any event, it seems like everything is in order  
10 in terms of the substance. I'll await the filing of the letter  
11 from you, then I'll act on it.

12 Is there anything else we need to address?

13 MR. DELL'ANGELO: Not from my perspective. Thank you,  
14 your Honor.

15 THE COURT: Thank you. I have nothing else either.  
16 We are adjourned.

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